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DEPARTMENT OF EDUCATION

34 CFR Chapter III

Docket ID ED-2018-OSERS-0024

Final Requirement--State Technical Assistance Projects to Improve Services and Results for Children Who Are Deaf-Blind and National Technical Assistance and Dissemination Center for Children Who Are Deaf-Blind (TA&D-DB).

**Catalog of Federal Domestic Assistance (CFDA) Number:
84.326T.**

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final requirement.

SUMMARY: The Assistant Secretary for Special Education and Rehabilitative Services announces a requirement under the Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities (TA&D) program. The Assistant Secretary may use this requirement for competitions in fiscal year (FY) 2018 and later years.

DATES: This requirement is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-8339.

SUPPLEMENTARY INFORMATION:

Purpose of Program: The purpose of the Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities program is to promote academic achievement and to improve results for children with disabilities by providing technical assistance (TA), supporting model demonstration projects, disseminating useful information, and implementing activities that are supported by scientifically based research.

Program Authority: 20 U.S.C. 1461, 1463, 1481, and 1482.

We published a notice of proposed requirement (NPR) in the *Federal Register* on June 20, 2018 (83 FR 28566). That notice contained background information and our reasons for proposing this particular requirement. The only difference between the proposed requirement and this final requirement is that we included a footnote within the final requirement explaining that this requirement does not apply to the National Technical Assistance and Dissemination Center for

Children Who Are Deaf-Blind. This is not a substantive change because we explained in the Background section of the NPR that it was not our intent to apply this requirement to that Center.

Public Comment: In response to our invitation in the NPR, 10 parties submitted comments on the proposed requirement. Generally, we do not address technical and other minor changes, or suggested changes that the law does not authorize us to make under applicable statutory authority. In addition, we do not address general comments that raised concerns not directly related to the proposed priorities or definitions.

Analysis of the Comments and Changes: An analysis of the comments follows.

Comment: The majority of commenters expressed support for limiting the indirect cost rate to 10 percent, indicating that this would allow more funding for the State Deaf-Blind Projects to provide TA to families and caregivers, professionals, and others providing services to children who are deaf-blind.

Discussion: We appreciate the commenters' support and agree with the comments for the reasons stated.

Changes: None.

Comment: One commenter expressed support for the cap on

indirect cost rates but raised a concern that some current State Deaf-Blind Projects that are university-based may not apply for future competitions because of the cap, leading to a loss of services for children who are deaf-blind within those States. The commenter suggested that the Department consider allowing universities to reach individual agreements with the Department on indirect cost rates. Another commenter opposed the proposed cap, arguing that negotiated indirect cost rates better ensure that necessary administrative costs for university-based State projects are covered and, therefore, that the proposed cap on indirect cost rates could jeopardize sound administration of State projects.

Discussion: We appreciate the commenters' concern regarding the potential for disruption of services for children who are deaf-blind within a State in the event an incumbent applicant does not apply for a new award under this program. We also appreciate the commenter's concern about the proper administrative oversight of State projects and we agree that strong administrative oversight is essential. However, many State deaf-blind projects, including university-based projects, have operated effectively while applying indirect costs at or below 10 percent of their modified total direct costs. For this

reason, we do not believe that the 10 percent cap established in this final rule will deprive the Deaf-Blind program of university-based applicants. We also believe that limiting the indirect cost rate, for university-based and non-university based projects, will not undermine sound administrative oversight of projects, but rather will be beneficial to the program and its intended beneficiaries and can be achieved with minimal disruption to project activities.

Finally, since this is a competitive grant competition, it would be inappropriate, as one commenter suggests, to have separate requirements for incumbent grantees unavailable to other grantees.

Changes: None.

Comment: One commenter stated that changes to the indirect cost rate for this program could cause confusion if a grantee also has other approved indirect cost rates from a Federal agency.

Discussion: We appreciate the commenter's concern about potential confusion if a grantee has another negotiated indirect cost rate granted by either the Department of Education or another Federal agency. We believe that grantees with sufficient administrative capacity to participate in this program will not find it difficult to

apply different indirect cost rates to grants from different agencies. However, to minimize the risk of confusion cited by the commenter, the Department is prepared to provide all necessary technical assistance to grantees under this program to ensure that they understand the new requirement and charge the appropriate indirect cost rate to the grant.

Changes: None.

FINAL REQUIREMENT

The Assistant Secretary establishes the following requirement for this program. We may apply this requirement in any fiscal year in which this program is in effect.

Final Requirement:

Allowable indirect costs.

A grantee may recover the lesser of (a) its actual indirect costs as determined by the grantee's negotiated indirect cost rate agreement and (b) 10 percent of its modified total direct costs. If a grantee's allocable indirect costs exceed 10 percent of its modified total direct costs, the grantee may not recoup the excess by shifting the cost to other grants or contracts with the U.S. Government, unless specifically authorized by

legislation. The grantee must use non-Federal revenue sources to pay for such unrecovered costs.¹

This notice does not preclude the Department from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose to use this priority and these requirements, we invite applications through a notice in the *Federal Register*.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment,

¹ The National Technical Assistance and Dissemination Center for Children Who Are Deaf-Blind (CFDA number 84.326T) (National Center) is not subject to this limitation on recovery of indirect costs.

public health or safety, or State, local or Tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866 and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2018, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions, unless required by law or approved in writing by the

Director of OMB. However, Executive Order 13771 does not apply to "transfer rules" that cause only income transfers between taxpayers and program beneficiaries, such as those regarding discretionary grant programs. Because this final requirement would be utilized in connection with a discretionary grant program, the requirement to offset new regulations in Executive Order 13771 does not apply.

We have also reviewed this final regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental,

public health and safety, and other advantages;
distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing this final requirement based on a reasoned determination that the benefits would justify the costs. In choosing among alternative regulatory approaches, we selected this approach to maximize net benefits. Based on the analysis that follows, the

Department believes that this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. This regulatory action may result in a subset of grantees under this program recovering less funds for indirect costs than they would otherwise have recovered prior to this final new maximum indirect cost rate, which could impact their operations. Further, it could result in particular entities not seeking funding under this program because of an inability to operate under this final new maximum indirect cost rate. However, we believe that the benefits to program beneficiaries of utilizing a higher percentage of program funds for direct services outweigh these costs.

Paperwork Reduction Act of 1995: This document does not contain Paperwork Reduction Act requirements. The Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities program has been

approved by OMB to collect data under OMB 1820-0028. The final requirement would not impact the approved and active data collection.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of final Federal financial assistance. This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact persons listed under FOR FURTHER INFORMATION CONTACT.

Electronic Access to This Document: The official version of this document is the document published in the *Federal Register*. You may access the official edition of the *Federal Register* and the Code of Federal Regulations via the Federal Digital System at: www.gpo.gov/fdsys. At this site you can view this document, as well as all other documents of this Department published in the *Federal*

Register, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the *Federal Register* by using the article search feature at: www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: August 16, 2018.

Johnny W. Collett,

*Assistant Secretary for Special Education and
Rehabilitative Services.*

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